No. 15276-77

United States Court of Appeals
For the Ninth Circuit

CHICAGO, MILWAUKEE, ST. PAUL and PACIFIC RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY, GREAT NORTHERN RAILWAY COMPANY and NORTHERN PACIFIC RAILWAY COMPANY, *Appellants,*

vs.

ALOUETTE PEAT PRODUCTS, LTD., *et al.,* *Appellees.*

INTERSTATE COMMERCE COMMISSION, *Appellant,*

vs.

ALOUETTE PEAT PRODUCTS, LTD., *et al.,* *Appellees.*

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

BRIEF OF APPELLEES

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THE ARGUS PRESS, SEATTLE

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STATEMENT AS TO JURISDICTION

The cases below involved an appeal to the District Court by appellees from an adverse decision of the Interstate Commerce Commission (T. 388).[1] The complaints filed in the District Court (T. 3, 45) were concerned solely with reparations, whereas the cases before the Commission involved future rates and reparations. 28 U.S.C.A. Sec. 1336 (28 U.S.C. Sec. 41 (28)) applies to an order denying reparations, and such an order may be reviewed by a District Court composed

[1] The Transcript of Record will be designated herein as "T."

of one judge. *United States v. Interstate Commerce Commission,* 337 U.S. 426, 93 L.ed. 1451 (1949).

STATEMENT OF THE CASE

This is an appeal from a judgment of the District Court (T. 37) reversing a decision of the Interstate Commerce Commission. Appellees originally filed complaints with the Commission against named railroads (T. 4, 46). The basis of these complaints was a decision of the Commission entered December 5, 1946, in *Ex Parte 162, Increased Railway Rates, Fares, and Charges, 1946,* 264 I.C.C. 695, and 266 I.C.C. 537 (hereinafter referred to as *Ex Parte 162*). In that proceeding the carriers had petitioned the Interstate Commerce Commission for general increases in their freight rates, and after hearing a decision was entered authorizing stated increases, and further authorizing the carriers to publish the tariff on five days' notice, the normal statutory notice period requiring thirty days' publication.

The Commission stated in *Appendix 1, of Ex Parte 162,* as follows:

> "Basic freight rates, whether class or commodity, and charges, on the commodities hereinafter specified, may be increased in the amounts and in the manner set forth as to each commodity class or group. The commodity group numbers (or commodity class numbers) used in this appendix, and throughout the entire report and order, for convenience, are those specified in the order of Division Four of November 22, 1927, *In the Matter of Freight Commodity Statistics,* which was in effect at the date of submission herein, although a new

list of commodity classes with articles assigned thereto has been promulgated by order of Division One, September 24 and October 16, 1946, to become effective January 1, 1947. They are intended generally to cover the items customarily included by the carriers in their reports to the Commission under each numbered description, as of the date for the submission." (266 I.C.C. 537 at 618, T. 31)

Further on Appendix 1 set forth the following allowed increase:

"Fertilizers, n.o.s., Including Potash — Group 640.

"Diatomaceous or Infusorial Earth — Group 701.

"Twenty percent, subject to a maximum of 6 cents per 100 pounds, or $1.20 per net ton." (266 I.C.C. 537 at 623, T. 32)

Commodity Group No. 640 of the Freight Commodity Statistics listing, referred to by the Commission, clearly included peat, ground or unground, as a fertilizer, n.o.s. (I.C.C. Ex. 5). It is thus clear that the increase in peat rates authorized in this *Ex Parte 162* decision was a 20% increase, subject to a maximum of 6 cents per 100 pounds.

The carriers, however, in the tariff issued under the authority of the *Ex Parte 162* decision, gave peat the full 20% rate increase in those cases wherein peat rates were not captioned "fertilizer" in their tariffs, and gave peat the 6 cent maximum rate in those cases wherein peat was captioned under "fertilizer" in their tariffs (T. 169, 407-411). Appellees are peat producers in British Columbia who suffered the full 20% increase, while shippers from points in the Middle West and East, and

from Eastern Canada, moved peat under the 6 cent maximum increase (T. 166, 167, I.C.C. Ex. 6 and 8).

The carriers applied the full twenty per cent increase from January 1, 1947, for practically the entire year. The result to appellees was disastrous. It should be stated that low peat rates had been originally set up to allow Western producers to enter and compete in distant markets (T. 257, 261, 273, 276-277). Eastern peat shippers made huge shipments of competitive peat into areas served by British Columbia shippers (T. 166, 180-181). The increased peat rates caused loss of market and development of peat substitutes (T. 156, 157). Appellees were unable to increase their selling prices commensurate with increased production costs during 1947 (T. 167-168). The natural result of all this was that the railroads began to lose business, and they began changing their tariff items to give appellees the benefit of the 6 cent maximum, beginning late in 1947, their master increase tariff being amended in March of 1948 (T. 197, 201-202). All rates were thus corrected except those to Northern California and the San Francisco Bay area, where the railroads persisted in giving peat the full 20% increase (T. 203). Appellees brought suit before the Interstate Commerce Commission in the companion cases of *Acme Peat Products, Ltd., et al., v. Akron, Canton & Youngstown Railroad Company, et al.,* I.C.C. Docket No. 29974, and *Alouette Peat Products, Ltd., v. Atchison, Topeka and Santa Fe Railway Company,* I.C.C. Docket No. 30260, praying for reparation for the overcharges during 1947, and praying for a correction of the rates to the Northern California and San Francisco Bay area.

After extended proceedings before the Interstate Commerce Commission, a Report and Order were entered on April 7, 1950, awarding reparation to appellees and ordering the said unauthorized increases removed (T. 321, 331). Petition for Reconsideration by the railroads was denied on January 7, 1952 (T. 354). A supplemental Order was entered on December 30, 1953, listing the exact amounts to be paid to each plaintiff by each defendant, said Order giving the carriers until February 19, 1954, to make the directed reparations (T. 356). On June 21, 1954, the railroads petitioned for leave to file a petition to re-open and reconsider (T. 369). This petition was granted (T. 377), the proceedings were re-opened, and the Commission, on reconsideration, after denying appellees' request for oral argument (T. 378) dismissed the Complaints on October 4, 1954 (T. 379, 388). Appellees' Petition for Reconsideration was denied by Order of the Commission dated January 3, 1955 (T. 406), and an appeal to the District Court followed.

Prior to filing of an appeal with the District Court, the railroads corrected the rates to Northern California and the San Francisco Bay area, and the District Court complaints prayed for reparations only. Suit in District Court was brought in each of the two cases against the United States (T. 3, 45). The Commission, and some of the railroads who had been defendants below, intervened (T. 14, 19). The two suits were consolidated by court order (T. 26) and are here upon a consolidated record. The District Court entered Findings of Fact, Conclusions of Law and Judgment reversing the Commission, finding the peat rates published purportedly

under *Ex parte 162* void, and remanding for the purpose of fixing reparations due appellees (T. 28, 37). This appeal followed.

SUMMARY OF ARGUMENT

I.

The Interstate Commerce Commission has promulgated a rule of procedure, Rule 101(f), under which it will not entertain a successive petition for rehearing upon substantially the same grounds as a prior petition. The Commission violated this rule when it entertained a second petition for rehearing by the carriers upon exactly the same grounds as a former petition. The only basis asserted for the action was that the Commission had changed its mind upon a similar set of facts in another case. This change of administrative policy is not substantially new grounds within Rule 101(f), and the violation of this Rule constituted a denial of procedural due process to appellees.

II.

The Commission authorized general rate increases in *Ex parte 162,* and in setting forth the increases allowed, utilized commodity group numbers laid down in a prior order. The carriers asserted authority to vary the commodities under such group numbers, and thus to change the rate classification of any specific item. They increased peat rates according to their own classification and without regard to the Commission's Order. The Commission held, and appellees assert, that such action was completely unauthorized.

III.

Congress has provided that no change shall be made in rates except upon thirty days' notice, provided that the Commission may modify this requirement in its discretion and for good cause shown. 49 U.S.C.A. Section 6(3). The *Ex parte 162* order provided that *authorized* increases would become effective upon five days' notice. As the peat rates in question were admittedly not authorized, neither the notice provisions of the Order or the statute have been complied with. Notice to the public is essential to the validity of rates filed, and with good reason. This case itself exemplifies the harm that may result to shippers where unauthorized rates become immediately effective: It took over a year in all for the railroads to reinstate the correct rates simply because of the time lag necessarily involved in the correction of tariffs. The purpose of the thirty-day notice provision is to allow interested parties to suspend challenged rates so that a hearing may be had before the rate change is made. When the Commission authorizes specific changes on a short notice, only those authorized changes are valid upon that notice.

IV.

The findings of the Commission that the challenged rates are reasonable and without undue prejudice or discrimination to appellees are arbitrary and without substantial supporting evidence. The evidence presented by appellees overwhelmingly showed the unreasonableness of the rates, and showed discrimination and damage to appellees. The rates were obviously more than the traffic could bear, and the lesser increase in rates gave Eastern peat shippers a decided advantage.

The Commission's findings are insufficient as they do not consider any of the evidence bearing on such factors as the effect of the rates on the movement of traffic or appellees' need of adequate transportation at the lowest cost consistent with service. The Commission concerned itself only with the question of the carrier's need of revenue, *i.e.,* the intrinsic reasonableness of the rates.

ARGUMENT

I.

The Order of June 21, 1954, granting a second petition to reopen and reconsider the proceedings constituted a denial of procedural due process to appellees.

49 U.S.C.A. Sec. 17 (6) governs rehearing and reconsideration of the Commission's decisions and orders and provides, among other things, as follows:

> " * * * Such applications shall be governed by such general rules as the Commission may establish. * * * "

Under the authority of this statute the Commission promulgated Rule 101 (f) of its General Rules of Practice, as follows:

> "*Successive petitions on same grounds, not entertained.* A successive petition under this section submitted by the same party or parties, and upon substantially the same grounds as a former petition, which has been considered and denied by the entire Commission will not be entertained." 49 U.S.C.A. Appendix, Rule 101 (f).

The proceedings in the instant cause before the Interstate Commerce Commission were closed by the order of April 7, 1950, granting the relief the appellees

had prayed for (T. 331). The appellant carriers (the defendants below) thereafter properly petitioned for reconsideration and that petition was denied (T. 354). The reparations, as finally computed, were ordered to be paid to appellees on or before February 19, 1954, yet on June 21, 1954, the Commission granted leave to reopen and file a petition for reconsideration and granted reconsideration (T. 377). The sole basis for this petition for leave to file a petition to reopen was the case of *F. W. Bolgiano & Co., Inc., v. Baltimore & O. R. Co.,* 291 I.C.C. 659, wherein the Commission reached a result contrary to that reached in the instant case. Every argument stated in the petitions of the railroad appellants filed on June 21, 1954 (T. 369, 371) was contained at length in their original petition for reconsideration filed June 22, 1950 (T. 333). In their briefs filed before this Court, appellants clearly state that the sole basis for the reconsideration was the *Bolgiano* case, *supra.* It is submitted that under its own rule the Commission did not have authority to entertain this successive petition.

The law is clear that the regulations of a government agency, duly promulgated and published, have all the binding force and effect of law, *U. S. v. Springfield Fire & Marine Ins. Co.,* 107 F.Supp. 753 (D.C. Mo. 1952) *aff'd* 207 F.(2d) 935 (C.C.A. 8th, 1953), and their violation, even by the administrator himself, constitutes in legal effect a violation of the statute. *Jeffries v. Olesen,* 121 F.Supp. 463 (D.C. Cal., 1954); *U.S. v. Shaughnessy,* 347 U.S. 260, 98 L.ed. 682 (1954); *Chapman v. Sheridan-Wyoming Coal Co., Inc.,* 338 U.S. 621, 94 L.ed. 393 (1950); *Bridges v. Wixon,* 326 U.S. 135, 89

L.ed. 2103 (1945); *U. S. v. Finn,* 127 F.Supp. 158 (D.C. Cal., 1954); *McKay v. Wahlenmaier,* 226 F.(2d) 35 (C.A.D.C. 1955). The *Jeffries* case, *supra,* stated that where the regulations set a higher standard of procedural due process than required by constitution or statute, the violation thereof is a denial of administratively established due process of law.

None of the cases cited in the briefs of appellants meet the issue of whether or not the Administrator can violate his own rules and regulations. The case of *Baldwin v. Scott Milling Co.,* 307 U.S. 478 (Brief of Commission, 17) involved the interpretation of the statute which clearly gives the Commission authority to grant a rehearing at any time. That case did not involve Rule 101 (f) under which the Commission has regulated its own authority. The cases of *Interstate Commerce Commission v. Jersey City,* 322 U.S. 503, and *U.S. v. Pierce Auto Lines,* 327 U.S. 515 (Brief of Commission, 20) are again not in point, those cases involving the question of whether a litigant can demand a rehearing as a matter of law because of a change of circumstances, and because the record has grown stale. The case of *Shein v. United States,* 102 F.Supp. 320 *aff'd* 343 U.S. 944 (Brief of Commission, 20, 21) involved no question as to the right to a rehearing, the plaintiff's position in that case being that the Commission having reported favorably on its application upon the evidence before it, could not upon reconsideration reverse its position and deny the application without taking new evidence.

It is submitted that the granting of a successive petition for rehearing years after the case was closed, and

after appellees had gone to great expense to file statements showing the exact reparations due, and in the face of the Commission's own rule, is a clear denial of procedural due process to these appellees, as was found by the lower court. The position of appellants that the Commission's change of heart in the *Bolgiano* case, *supra,* is sufficient to remove the case from the rule would be not only a strained construction of the rule, but would emasculate it entirely. Under even the most liberal interpretation of the rule, the Commission's change of mind cannot be a substantial new ground authorizing a successive rehearing. It has been stated that an administrative decision may not be repudiated for the sole purpose of applying some quirk or change in administrative policy, even the power of executive agencies being not without limit. *Chapman v. El Paso Natural Gas Co.,* 204 F.(2d) 46 (C.A. D.C. 1952).

II.

The carriers acted in contravention of *Ex parte 162* in publishing peat rates subject to the full twenty per cent increase.

Ex parte 162 authorized an increase in rates on fertilizers n.o.s., group 640, of twenty per cent subject to a six-cent maximum. Although peat is included under Group 640, the carriers published the six-cent maximum on peat rates only when it was carried in their tariffs as a fertilizer. Where peat had a separate commodity rate in their tariffs, it was given the full twenty per cent increase (T. 324).

Appellant railroads in their first argument (Brief, 11) urge that under the *Ex parte 162* order the car-

riers were required only generally to apply the increases to commodities as listed for statistical purposes, and that they had authority to vary the statistical commodity listings as they saw fit.

This argument was rejected by the Interstate Commerce Commission from the very beginning (T. 326-327, 382). The argument of the railroads centers around the single sentence in the Appendix to *Ex parte 162*:

> "They are intended generally to cover the items customarily included by the carriers in their reports to the Commission under each numbered description, as of the date for the submission." (T. 323-324)

It is submitted that this sentence is taken out of context. The first sentence in that paragraph is the controlling direction to the carriers as to the amount and manner of making increases and reads as follows:

> "Basic freight rates, whether class or commodity, and charges, on the commodities hereinafter specified, may be increased in the amounts and in the manner set forth as to each commodity class or group." (T. 323)

The Commission then continues in that paragraph, after making this direct statement, to explain what commodity groups they have reference to. The next two sentences are a rather long explanation concerning these commodity group numbers, this explanation including the above mentioned sentence relied on by appellant railroads to the effect that they (the commodity group numbers) are intended to cover items customarily included by the carriers in their report.

The Commission never had the slightest intention

that the individual carriers could vary the commodities commonly reported under these group numbers and place such commodities under other classifications, thus subjecting them to different freight rates. If this were the case, wherever individual carriers varied in their tariffs, varying increases throughout the country would result. The appellant carriers have not denied that they commonly and customarily report peat under Item 640 of the statistical listing; they rely on the fact that they carry it under different headings in their own tariffs to remove them from the directions given in *Ex parte 162.*

III.

The peat rates issued by the railroads under the ostensible authority of *Ex parte 162* were void in law and the carriers had no authority to make any charges except under the former tariffs in effect.

There was no publication of the peat rates as required by law in this case. The statutory requirement of publication is as follows:

> "*Change in rates, fares, etc.; notice required; simplification of schedules.* No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to

public inspection: *Provided,* That the commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions: *Provided further,* That the commission is authorized to make suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulations the filing of an amendment of or change in any rate, fare, charge, or classification without filing complete schedules covering rates, fares, charges or classifications not changed if, in its judgment, not inconsistent with the public interest." 49 U.S.C.A. Sec. 6 (3).

It is thus a requirement of statute, which the Commission may not override, that there either be a compliance with the notice provisions provided therein, or compliance with an order of the Commission applying to the particular case at hand. The purpose of the statute is, of course, to give notice to the public and to allow them to protest and suspend rates prior to their taking effect. It is submitted that in those instances wherein the Commission determines that this safeguard shall be dispensed with, that there must be strict compliance with such order. The order of the Commission in *Ex parte 162* directed that *authorized* increased rates and charges may be made effective upon not less than five days' notice to the Commission and the general public. 266 I.C.C. 537 at 617. As the peat rates complained of were not authorized increases, the carriers

cannot bring themselves within the five-day notice provision. And they, of course, did not publish any thirty-day statutory notice. In short, there is no publication of any kind here, and the rates are, therefore, null and void.

The position of the appellants is exemplified by the statement of the Commission in the Report of October 4, 1954, as follows:

> "—the defendants are subject to censure for improper tariff publication but that situation alone does not afford an adequate basis for a finding of unreasonableness or an award of reparation, since we have no authority to award punitive or exemplary damages." (T. 382)

We thus have a finding of fact in this case by the Interstate Commerce Commission that the tariff contravened their order and that it was published without any authority, followed by their conclusion of law that appellees were not entitled to relief therefor.

The appellants make much of the argument that if rates are declared void or inapplicable although filed that the shipper would be charged with knowledge that he does not and frequently could not possess; they urge that public policy requires that tariffs when filed contain the applicable rates as soon as filed. Appellees do not urge that errors or mistakes in a *published* tariff void the same, our position going solely to the question of notice and proper publication. It cannot be overemphasized that in the normal case of tariff changes there is a thirty-day publication period during which all interested parties have an opportunity to peruse the tariffs and challenge any part thereof. In the instant

case the tariffs became effective upon only five days notice (T. 407, 409). This period of notification covered the Christmas holiday season at the end of 1946, the tariffs becoming effective January 1, 1947. There was thus no opportunity for persons or parties who might be injured by the rates and charges to suspend such rates pending a hearing (T. 327). The rates were in effect three months before appellees knew the full twenty per cent increase was being assessed (T. 194), and appllees only obtained relief from the exorbitant rates as a result of an appeal to the carriers, and the carriers' modification of their tariffs in the various rate territories between December 1, 1947, and March 29, 1948 (T. 260, 314).

In the original Report of April 7, 1950, the Commission stated:

> "These rates were increased by defendants under color of approval by this Commission in a general revenue proceeding in which authority was sought, because of an emergency, to depart from the usual method of rate publication and to reduce the statutory filing time for the tariffs.—In publishing the rates on peat here considered, however, defendants disregarded the maximum which the Commission had prescribed in connection with its approval of a percentage increase. As these increases were named in tariffs which became effective on short notice, complainants were prevented from exercising the statutory right that otherwise would have been available to enter protest before the increased rates took effect. It is our opinion that the complainants, who paid the unauthorized increases, are entitled, under the Interstate Commerce Act, to be placed in the same situa-

tion in which they would have been had the defendant carriers complied with our order. Section I requires that rates and charges be both just and reasonable." (T. 328-329)

Appellants rely most heavily upon the case of *Davis v. Portland Seed Co.,* 264 U.S. 403, 68 L.ed. 762 (1923), as authority for the proposition that a rate which is filed is the applicable and legal rate although improperly published. The *Davis* case only indirectly involved the improperly published rate and there is no direct challenge of that rate as such. The shippers there alleged that they were overcharged under the correctly published rate for their haul because there was an improperly published lower rate for a longer haul, thus bringing the carriers within the violation of that section of the statute prohibiting publication of a greater rate for a short haul than that published for a longer haul. The court held that the mere publication of the forbidden lower rate did not efface the higher intermediate rate which was a properly published rate.

The only case which appellees have found which is directly in point is the case of *Illinois Central R. Co. v. Van Duesen-Harrington Co.,* 170 Minn. 488, 212 N.W. 940 (1927) *cert. den.* 275 U.S. 554. In that case the Interstate Commerce Commission had authorized a carrier to issue a supplement to its tariff on less than statutory notice, cancelling and re-issuing a former supplement, unchanged except to correct a specified mistake. In the new supplement a rate of 17.5 cents, which should not have been changed, appeared as 1.5 cents. The court stated that tariff rates filed and published under the Interstate Commerce Act are binding and

conclusive on the carrier and shipper until changed in a manner provided by law. It was held that the 1.5 cent rate was not a lawful rate as it was not authorized by the Commission and a statutory notice was not given. The court said the new supplement was issued in violation of both the statute and the Order of the Commission, which is exactly the case now being appealed.

The Supreme Court has recognized this rule in *United States v. Miller,* 223 U.S. 599, 56 L.ed. 568 (1912), wherein the court upheld a tariff against the argument that the failure to have it posted at a particular place invalidated it. The court stated that publication is a step in establishing rates while posting is a duty arising from the fact that they have been established, and that the posting is not a condition to making a tariff legally operative. *Accord*: *Chicago, I. & L. Ry. Co. v. International Milling Co.,* 43 F.(2d) 93 (C.C.A. 8th, 1930) *cert. den.* 282 U.S. 885.

A Congressional policy is clearly shown in 49 U.S.C.A. Section 6 (3) to give the general public notice of a proposed change before its effective date. Where the normal notice is dispensed with and this is to be "for good cause shown," surely the public should be protected at least to the extent that the order of the Commission be obeyed. That a rate unauthorized by the Commission may be pushed through on such a short notice that the public has no opportunity to protest is inconceivable. The legal conclusion of the Commission that an "improperly" published tariff is nevertheless applicable is contrary to law, and where agency action is a clear mistake of law applied to the admitted facts the courts will grant relief. *Jeffries v. Olesen,* 121 F.

Supp. 463 (D.C. Cal. 1954); *U.S. v. I.C.C.,* 198 F.(2d) 958 (C.A. D.C. 1952), *cert. den.* 344 U.S. 893. The District Court correctly held the improperly published peat rates void and held the prior rates were the only ones applicable.

IV.

The twenty per cent increase in peat rates was unreasonable and created undue prejudice and discrimination to the appellees, and the findings of the Commission to the contrary are arbitrary and without substantial supporting evidence.

Assuming that a rehearing was properly had and that the rates charged to appellees were the legal and applicable rates, the question arises whether the Commission was arbitrary in finding that the rates were reasonable and did not create any undue prejudice to appellees under Sections 1 and 3 of the statute.

In reparation cases the Commission acts quasi-judicially and the rules of evidentiary law should be more carefully observed than when the Commission is acting in a quasi-legislative capacity; the evidence should be as competent and conclusive as is necessary to support a judgment in an action at law. *Hackney Bros. Body Co. v. New York Central R. Co.,* 85 F.Supp. 465 (D.C. N.C. 1949); *Pitzer Transfer Corp. v. Norfolk & W. R. Co.,* 10 F.Supp. 436 (D.C. Md. 1935). In *United States v. Interstate Commerce Commission,* 198 F.(2d) 958 (C.A. D.C. 1952), *cert. den.* 344 U.S. 893, which was the first reparation order accorded direct judicial review, the court stated that it would apply the standards of judicial review applicable to administrative actions as reflected in the administrative procedure act,

and held that the Order would be reviewed to determine whether it was entered arbitrarily and without substantial supporting evidence, or in defiance of law or the standards established by Congress to determine when reparations are due. See also, *Salvino v. United States,* 119 F.Supp. 277 (D.C. Wash. 1954); *Old Colony Furniture Co. v. U.S.,* 95 F.Supp. 507 (D.C. Mass. 1951); *Hudson Bus Transportation Co. v. U.S.,* 90 F. Supp. 742 (D.C. N.J. 1950); *Acme Fast Freight v. U.S.,* 116 F.Supp. 97 (D.C. Del. 1953).

A. Unreasonableness Under Section 1

Section 1 (5) provides as follows:

> "All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful." 49 U.S.C.A. Section 1 (5).

Section 1 (6) provides in part as follows:

> "*Classification of property for transportation; regulations and practices.* It is made the duty of all common carriers subject to the provisions of this chapter to establish, observe, and enforce just and reasonable classifications of property for transportation,—and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful." 49 U.S.C.A. Section 1 (6).

It should be pointed out that if rates are found unreasonable under Section 1, no specific proof of damage is necessary, but if they are reasonable there can still be reparation if there is specific damage flowing from

such violation. *US. v. I.C.C.,* 198 F.(2d) 958 (C.A. D.C. 1952), *cert. den.* 344 U.S. 893; *Great Northern R. Co. v. Sullivan,* 294 U.S. 458, 79 L.ed. 992 (1935); *I.C.C. v. U.S.,* 289 U.S. 385, 77 L.ed. 1273 (1933). The general tendency of the law, as stated in *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.,* 245 U.S. 531, 62 L.ed. 451 (1918), in regard to damages, is not to go beyond the first step where the plaintiffs suffered losses when they paid the unreasonable charges, as the carrier ought not to be allowed to retain his illegal profit.

The basic peat rates that were in effect at the time of the *Ex parte 162* proceedings were voluntarily established by the carriers and had been maintained over a long period of time (T. 257-258, 276-277). These rates had been established with a view to providing a rate that would enable Pacific Coast producers to meet competition (T. 261, 273). There is a presumption that rates so maintained are reasonable. *Skinner & Eddy Corp. v. U.S.,* 249 U.S. 557, 63 L.ed. 772 (1919). The question then before the Commission was whether the rates as increased were reasonable and just. Appellants have stated that appellees' position is that the increase is unreasonable, without regard to the reasonableness of the entire rate; appellees' position, of course, is that the rate as increased was unreasonable. Appellants further urge that they could have been charging appellees a higher rate right along and that if they had raised the rate through the years, that such rate would be higher than the increases here complained of. Appellees submit that such an argument is beside the point. A rate satisfactory to all had been established by the railroads and this rate is presump-

tively reasonable. There is no evidence whatsoever that any such increases would have resulted in just and reasonable rates. It is undisputed that the railroads had to voluntarily reduce the twenty per cent increase they placed upon peat rates. No clearer evidence could be had that such an increased rate was unreasonable and was more than the traffic would bear.

Appellants contend that the Commission in *Ex parte 162* determined the reasonabless of the increase and not of the rate as increased. The *Ex parte 162* decision did determine that it would not be in the public interest to increase peat rates more than the six-cent maximum. Yet the Commission in the instant case determined that charging over that maximum is reasonable. Again the Commission itself has held that carrier application of emergency charges different from those authorized by the Commission was unreasonable. *Adams Lumber Co. v. A.C. & Y.R. Co.,* 253 I.C.C. 179.

The Report and Order of the Commission of October 4, 1954 (T. 379-389), concluded that there was no evidence of unreasonableness in this case (T. 386). The only substantiating findings of fact by the Commission are facts showing the car revenue and the statement that the railroads had not taken the full rate increases in the past, which would have been allowed. The Commission disregarded and did not consider the evidence submitted by appellees, basing its result solely upon railroad revenue considerations, which, standing alone, is insufficient. As showing that the Commission did not use the proper basis in determining reasonableness, the Congressional policy as shown in 49 U.S.C.A. Section

15 (a) may be cited. It is there stated that in prescribing just and reasonable rates the Commission shall consider the effect of the rates on the movement of traffic, the need of adequate railroad transportation at the lowest cost consistent with the service, and the carrier's need of revenue.

The evidence introduced before the Commission by appellee's witnesses showed that the twenty per cent increase in peat rates adversely affected the sale of the product (T. 156, 157, 161, 166, 180, 181, 242) and opened the way for a more extensive use of substitutes (T. 154, 156). The evidence showed that some producers had to make an allowance in price in order to compete at all and that prices could not be raised although production costs had gone up (T. 242, 167). While it is true that the car revenue was low, this is not the only consideration. Appellees showed that peat shippers do not require special or top quality cars, but use any type of closed equipment available, and that claims are not made against the railroads by peat shippers (T. 241). These factors very definitely affect the income of the railroads and the desirability of this type of business.

It was stated in *Mississippi Public Service Commission v. U.S.*, 124 F.Supp. 809 (D.C. Miss. 1954) *aff'd* 349 U.S. 908, that in fixing reasonable rates competition is one of the elements to be considered and is frequently controlling, the court adding that in determining the legal question as to whether the evidence amounts to substantiality the court must likewise weigh such factors. The Commission itself has held that subsequent voluntary reduction of rates, considered with other evidence, creates a presumption that the prior rates were

unreasonable. *Terrill Machine Co. Inc. v. Central Vermont R. Inc.,* 255 I.C.C. 795; *Harding Glass Co. v. S.L.-S.F. R. Co.,* 253 I.C.C. 550. In *U.S. v. I.C.C.,* 198 F.(2d) 958 (C.A. D.C. 1952) *cert. den.* 344 U.S. 893, where the shipper complained of unlawful wharfage charges, the carriers contended that a higher rate might have been published. The court said that if such a defense could be urged, an *ad hoc* amendment of the tariff would result.

It is appellees' position that the Commission's Findings show that all factors were not considered and further that the overwhelming weight of the evidence shows the rates charged were unreasonable. It is clear that the Commission must set forth in its report the basic or essential or quasi-jurisdictional findings necessary to support its ultimate conclusion, *New York Central R. Co. v. U.S.,* 99 F.Supp. 394 (D.C. Mass. 1951) *aff'd* 342 U.S. 890, 96 L.ed. 667; *United States v. Chicago, M. St. P. & P. R. Co.,* 294 U.S. 499, 79 L.ed. 1023 (1935); *DuBois v. Central R. Co. of New Jersey,* 22 F.Supp. 469 (D.C. N.J. 1938), and the settled policy of the law is to require every tribunal to reduce its essential findings to writing; the grounds upon which such tribunal's Order must be judged are those upon which the record discloses that Order was based. *Cantley & Tanzola v. U.S.,* 115 F.Supp. 72 (D.C. Cal. 1953). And see *Meeker v. Lehigh Valley R. Co.,* 236 U.S. 412, 59 L.ed. 644 (1915) and *Mills v. Lehigh Valley R. Co.,* 238 U.S. 473, 59 L.ed. 1414 (1915).

B. Discrimination Under Section 3

Section 3 (1) of the Act provides as follows:

"It shall be unlawful for any common carrier

subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description." 49 U.S.C.A. Section 3 (1).

The finding of the Commission that there was no undue prejudice is arbitrary and contrary to the substantial weight of the evidence. The substantial weight of the evidence in this case was to the effect that Eastern peat shippers, in direct competition with the Western peat shippers and serving the same areas, enjoyed the six-cent maximum at the same time that the Western peat shippers suffered the full twenty per cent increase (T. 324-325 and I.C.C. Ex. 6). There was no justification given for this difference, and the actual and admitted reason was that in the tariffs applied to the Eastern shippers peat was carried under the fertilizer classification, whereas in the tariffs applying to the Western shippers, peat was given a separate commodity classification (T. 265-268). It is submitted that in view of the extensive and very serious damage which

resulted to Western shippers, this is a poor excuse indeed.

Unjust discrimination has been found even where rates were reasonable where it is shown that the discrimination is not justified by the cost of the respective services, their values, or their transportation conditions. *New York v. U.S.,* 331 U.S. 284, 91 L.ed. 1492 (1947), *Reh. den.* 331 U.S. 866; *U.S. v. Illinois C. R. Co.,* 263 U.S. 515, 68 L.ed. 417 (1924). The court, in the *Illinois Central Railroad* case, stated that the fact that a discriminatory rate is inherently reasonable and that other rates are not unreasonably low does not establish that discrimination is just as both rates may be within the zone of reasonableness and yet result in undue prejudice. See also *Chesapeake & O. R. Co. v. U.S.,* 11 F.Supp. 588 (D.C. Va. 1935) *aff'd* 296 U.S. 187.

The substantial weight of the evidence shows damage to appellees, which damage was a direct result of the increased rates charged appellees. If by reason of the discrimination the preferred producers have diverted business, or if the discrimination has forced the shipper to sell at a lower market price, there is measureable damage to the shipper. *I.C.C. v. U.S.,* 289 U.S. 385, 77 L.ed. 1273 (1933); *Pennsylvania R. Co. v. Terminal Warehouse Co.,* 78 F.(2d) 591 (C.C.A. 3rd 1935) *aff'd* 297 U.S. 500.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be affirmed and these proceedings remanded to the Interstate Commerce Commission for the purpose of fixing reparations in accordance with the judgment of the District Court.

Respectfully submitted,

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